IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC87125**
	)	
CHRISTOPHER MILO WHITELEY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF DALLAS COUNTY, MISSOURI
THIRTIETH JUDICIAL CIRCUIT
THE HONORABLE JOHN W. SIMS, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from convictions of second degree murder, § 565.021, RSMo 2000, and attempted second degree robbery, § 565.030, in the Circuit Court of Dallas County and for which appellant was sentenced to twelve years imprisonment for murder and twelve months in the county jail for robbery. Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, §3, Mo. Const. (as amended 1982); §477.060. That Court granted the respondent's application for transfer after an opinion, so this Court now has jurisdiction. Article V, §§3 and 10, Mo. Const. (as amended 1982) and Rule 83.02, V.A.M.R.

STATEMENT OF FACTS

Chris Hamilton and his wife Angie began making plans to move from Illinois to his mother's property in Dallas County in the fall of 2002 (Tr. 216). To that end they hired appellant, Christopher Whiteley, and David Franklin to clear some brush from the land (Tr. 165). At the time he hired them, Hamilton told them he would be back to pay them in a few weeks, and they could tell him what was owed (Tr. 166-67).

Hamilton did not return as promised because of a delay in his wife's job transfer (Tr. 167). When he did return, he paid Franklin $160 but told appellant that he did not have the money to pay him (Tr. 167). He promised appellant that he would pay when he could (Tr. 168). Eventually Hamilton paid appellant $20 (Tr. 168). He thought that he owed $100 total (Tr. 167). By September of 2003, nearly a year later, Hamilton still had not paid appellant more than $20 (Tr. 168, 244).

On September 1, 2003, Hamilton, his wife, and two friends were sitting in front of his camper when appellant drove up in his truck and began shouting (Tr. 172). When he left, he was yelling out the window (Tr. 172). A few days earlier, he had threatened to rape Angie and "have his way with her" (Tr. 174).

The Hamiltons were frightened by these threats and drove to the south edge of their property to hide (Tr. 176). While they were there, they heard a loud truck pull up (Tr. 176). Appellant drove a loud truck (Tr. 176).

After waiting a while, they drove back to the camper and discovered that the front windshield of Hamilton's truck was broken (Tr. 177). Hamilton considered notifying the authorities about the incident, but hoped that he could work it out himself (Tr. 178).

On September 3, Hamilton was driving toward Bennett Springs when he passed a truck in which appellant was riding as a passenger (Tr. 178-80). Appellant started yelling out of the truck, and Hamilton stopped (Tr. 179). At that point appellant asked if Hamilton had his money, and Hamilton replied yes and paid appellant the amount that was owed (Tr. 179). After appellant got the money, he threw a beer bottle over the truck at Hamilton's vehicle (Tr. 180).

Hamilton drove to a nearby store and discussed the situation with the owner, claiming that he feared appellant because he still owed appellant money (Tr. 310). At that point Hamilton decided to notify the sheriff's department of his problems with appellant (Tr. 180).

During the day and evening appellant was visiting with his friend Eldon Lee Sanders and Sanders' fiancée, Jeannie Green (Tr. 390, 393). Appellant told Sanders that he wanted to go up the road and collect some money (Tr. 394). Sanders refused to go along, but appellant told him that he was going to take him to collect the money (Tr. 395). Appellant claimed that he was owed $25 (Tr. 395). Eventually Sanders agreed to take appellant (Tr. 395).

Appellant and Sanders drove to Hamilton's home, and appellant demanded $50 from Hamilton (Tr. 185). Appellant began punching Hamilton in the face (Tr. 186). Then he went to the back of his truck and got a large club (Tr. 186). Hamilton ran inside his camper and grabbed a shotgun (Tr. 186). As he walked back to the door, he saw Sanders walking toward him (Tr. 187). As Sanders put his foot on the bottom step leading to the camper, Hamilton shot and killed him (Tr. 187, 261-62).

Hamilton, who already had been convicted of carrying a concealed weapon and marijuana offenses, took a knife and put it by Sanders to make the situation look more threatening than it was (Tr. 188, 223). Angela called 911 for help (Tr. 253). Sanders was actually unarmed and had not made any threats before he was shot (Tr. 194).

The authorities were on their way to the Hamilton's home when they heard about the incident (Tr. 318). They secured and questioned Hamilton, who first reported that Sanders had come into his camper to get a knife (Tr. 357). This did not ring true in view of the physical evidence, and the authorities eventually got Hamilton to tell the truth and admit that Sanders was unarmed (Tr. 358).

Meanwhile, appellant ran back to Jeannie's home, got down on his knees and said he'd done "something awful" and "killed him" (Tr. 396). Jeannie ran out and began looking for Sanders (Tr. 397).

The authorities drove to Sanders' home, and Jeannie told them where appellant lived (Tr. 336, 397). They knocked on the door but received no answer (Tr. 326). There appeared to be fresh blood on the porch (Tr. 326). Despite not having a warrant, the authorities decided to enter appellant's residence and found him lying on a couch (Tr. 327).

Appellant was charged with second degree murder, § 565.021, and attempted robbery, §565.030, RSMo 2000 (L.F. 8). The murder charge was predicated upon appellant's committing attempted second degree robbery (L.F. 8).

The state adduced the evidence outlined above. The defense objected to Chris and Angela Hamilton's testimony concerning appellant's

threats, including the fact that appellant broke the window of Hamilton's car (Tr. 170-77). The trial court overruled the objection and permitted both of the Hamiltons to testify to the prior acts and threats (Tr. 177, 243-45).

Hamilton testified at trial, and acknowledged on cross-examination that he could not remember appellant demanding money the night of the killing (Tr. 217). He was unsure whether he actually paid appellant or not (Tr. 217).

Angela Hamilton testified that she was sleeping the night of the incident and woke up to her husband's shouting that "they" were out there (Tr. 251). She asked who, but Hamilton was so panicked that he didn't answer (Tr. 251). His face was bleeding (Tr. 251). At that point she saw Hamilton looking for his gun, and a man was standing right at the door (Tr. 252). She yelled at the man to go away (Tr. 252). Instead, he tried to open the door, which was locked (Tr. 252).

Angela ran to check on her son, and when she came back, she saw her husband standing by the door with his gun (Tr. 252). He cracked the door open and said "I've got a gun, please leave." (Tr. 252). The man started to move toward the door, and the gun went off (Tr. 253). Angela believed that the man's feet were probably right at the bottom step (Tr. 254).

The state also called Jeannie Green, who testified that on September 3, she was at home with Sanders when appellant brought a gun over and put it in her lap (Tr. 391). She made him take it out, but not before appellant scuffled with Sanders (Tr. 391). Appellant was drinking with Sanders and told Sanders he wanted to go collect some money that was owed him (Tr. 394). He threatened to kill the person who owed him money, and didn't care if it was over five or fifty cents (Tr. 394). Appellant had previously identified Hamilton as the one who owed him money (Tr. 394).

Sanders did not want to accompany appellant, but appellant told him, "the son-of-a bitch owes me $25 dollars and I'm going to get my money" (Tr. 394). He told Sanders that Sanders was going to take him (Tr. 395). The two left (Tr. 395). About a half-hour later, he came to Jeannie, got down on his knees and said he had done something "awful" (Tr. 396). He stated that he "killed him" (Tr. 396).

After the state rested, the defense called Gene Gietzen, a forensic scientist who testified that he reviewed blood spatter in the photographs of the crime scene and determined that the patterns were inconsistent with Hamilton's and Angie's accounts that Hamilton was inside the camper when he shot Sanders (Tr. 435). The gun was shot from outside (Tr. 436).

Mr. Gietzen's conclusions were based upon photographs in the case, from which he was able to determine directionality, though not the angle at which the blood was deposited (Tr. 428).

Appellant requested a third degree assault instruction as a lesser offense, which was refused on the ground that "assault in the third degree is not a lesser included offense of attempted burglary" (Supp. L.F. 1, Tr. 460). The jury found appellant guilty of second degree murder and attempted second degree robbery (L.F. 40-41). It recommended a twelve year sentence for murder and twelve months imprisonment in the county jail for attempted robbery (L.F. 48). Appellant was sentenced in accordance with the jury's verdict, the sentences to be served concurrently (L.F. 60-62). This appeal followed (L.F. 64-67).

POINTS RELIED ON

I.

The trial court erred in refusing to instruct the jury on the lesser offense of third degree assault, because this offense is a lesser included offense of second degree robbery, and failing to so instruct the jury violated appellant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lower since there was evidence that appellant acted under a claim of right, as comprehended in § 570.070.1(1), since there was evidence that Hamilton had not paid him for his work as promised, and there was evidence that appellant struck Hamilton.

State v. Ellis, 639 S.W.2d 420 (Mo. App., W.D. 1982);

State v. Pond, 131 S.W.3d 792 (Mo. banc 2004);

State v. Quisenberry, 639 S.W.2d 579 (Mo. banc 1982);

State v. Smith, 822 S.W.2d 911 (Mo. App., E.D. 1991); and

Sections 556.046.2, 556.051(1), 565.070, 569.010, 569.030, 570.070; and

MAI-Cr 323.04

II.

The trial court abused its discretion in overruling defense counsel's objections and in admitting evidence that on September 1, 2003, and earlier, appellant threatened to rape Hamilton's wife and threatened the family in an incident in which the Hamilton family was forced to hide out and in which a window of Hamilton's truck was broken, because that evidence was neither logically nor legally relevant and its admission violated appellant's rights to due process of law and to be tried only for the crime with which he was charged, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, and 18(a) of the Missouri Constitution, in that the result was a trial within a trial forcing appellant to defend against a charge that had never been filed and creating a likelihood that he was convicted because he had committed the uncharged crimes.

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

State v. Conley, 873 S.W.2d 233 (Mo. banc 1994);

State v. Danikas, 11 S.W.3d 782 (Mo.App., W.D. 1999);

U.S. Const., Amend. V & XIV; and

Mo Const., Article I, § 10, 17, 18(a).

I.

The trial court erred in refusing to instruct the jury on the lesser offense of third degree assault, because this offense is a lesser included offense of second degree robbery, and failing to so instruct the jury violated appellant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lower since there was evidence that appellant acted under a claim of right, as comprehended in § 570.070.1(1), since there was evidence that Hamilton had not paid him for his work as promised, and there was evidence that appellant struck Hamilton.

The trial court erred in refusing to instruct the jury on the lesser included offense of third degree assault. There was a basis in the evidence for the jury to acquit appellant of robbery and second degree murder, and convict him of assault. This is because there was evidence that, at the time of the incident, Chris Hamilton owed appellant money and appellant was acting in an effort to take what he believed was rightfully his when he used physical force against Hamilton. Failing to so instruct the jury

deprived appellant of due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Defense counsel submitted an instruction submitting third degree assault as a lesser included offense, which was refused (Supp. L.F. 1). This allegation was raised in appellant's motion for new trial (L.F. 57).

Standard of Review

The failure of the trial court to instruct on all lesser-included offenses supported by the evidence is error. *State v. Derenzy*, 89 S.W.3d 472 (Mo.banc 2002). A defendant has a due process right to lesser-included offense instructions if they are warranted by the evidence. *Mercer v. State*, 666 S.W.2d 942, 945 (Mo.App. S.D., 1984).

A trial court is required to instruct on a lesser-included offense if the evidence, in fact or by inference, provides a basis for both an acquittal of the greater offense and a conviction on the lesser offense, and if such instruction is requested by one of the parties. *State v. Santillan,* 948 S.W.2d 574, 576 (Mo.banc 1997); *see also* Section 556.046, RSMo Supp. 2001. "Doubt as to whether to instruct on the included offense is to be resolved in favor

of instructing on the included offense." *State v. Yacub*, 976 S.W.2d 452, 453 (Mo.banc 1998); *State v. Barnard*, 972 S.W.2d 462, 464 (Mo.App. W.D., 1997).

Jurors may accept part of a witness' testimony while disbelieving other portions. *State v. Robinson*, 26 S.W.3d 414, 417 (Mo.App. E.D., 2000). Jurors may also draw certain inferences from a witness's testimony, but reject others. *State v. Redmond*, 937 S.W.2d 205, 209 (Mo.banc 1996). Further, the evidence is viewed in the light most favorable to the defendant, i.e., in the light most favorable to the giving of the instruction. *State v. Edwards*, 980 S.W.2d 75, 76 (Mo.App. E.D., 1998); *State v. Craig*, 33 S.W.3d 597, 601 (Mo.App. E.D., 2001).

Assault is a Lesser Included Offense of Second Degree Robbery

An offense is a lesser included offense when "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." § 556.046.1, RSMo 2000, *State v. Derenzy,* 89 S.W.3d 472, 474 (Mo. banc 2002). An offense is a lesser-included offense if it is impossible to commit the charged offense without necessarily committing the lesser. *Id.* Third degree assault is a lesser included offense of second degree robbery. *State v. Smith,* 822 S.W.2d 911, 915 (Mo. App., E.D. 1991).

Section 569.030.1 provides: that "[a] person commits the crime of robbery in the second degree when he forcibly steals property." A person "forcibly steals property" when "in the course of stealing…he uses or threatens the immediate use of physical force upon another person…" to prevent or overcome resistance to taking of property, or to compel the owner to deliver the property. § 569.010.

Section 565.070 provides that a person commits third degree assault if, *inter alia,*:

"(1) The person attempts to cause or recklessly causes physical injury to another person; or

***

(3) The person purposely places another person in apprehension of immediate physical injury; or

***

(5) The person knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative…."

"The noun 'force' means 'power exerted against will or consent.' *State v. Kunkel,* 244 S.W. 968, 969 (Mo.App. K.C.D. 1922). It would be

impossible to "threaten the use of immediate force" without placing another person "in apprehension of immediate physical injury." It would also be impossible to use force without knowingly causing "physical contact with another person knowing the other person will regard the contact as offensive or provocative…." The offense of second degree robbery therefore encompasses the elements of third degree assault, which makes third degree assault a lesser included offense of second degree robbery.

Under the facts of this case, the evidence of second degree robbery encompassed an attempt to cause physical injury to Hamilton. The amended information alleged that appellant "having demanded $50.00 from Christopher Hamilton, struck Christopher Hamilton in the face…." (L.F. 8). The verdict director submitted "the defendant went to the home of Christopher Hamilton and struck him, after demanding $50.00 from Christopher Hamilton…." (L.F. 33).

Appellant's requested instruction submitted that appellant "attempted to cause physical injury to Christopher Hamilton by striking him in the face…" Thus, the instruction both legally and factually submitted a lesser included offense.

There was a Basis for Acquitting Appellant of Robbery and Convicting him of Assault

Here, there was a basis for acquitting appellant of robbery and convicting him of assault. This is because there was evidence that Hamilton had owed appellant money for about a year at the time appellant went to his home, and if appellant believed that Hamilton still owed him, his claim of right was a defense.

Section 570.070.1(1), RSMo 2000 provides that a person does not commit stealing if, at the time of the appropriation, he "acted in the honest belief that he had the right to do so…." The defense has the burden to inject this issue. Section 570.070.2.

Section 570.070 "recognizes that a creditor who takes property from his debtor in settlement of a debt lacks the requisite mental state for stealing if he honestly believes he has a legal right to settle the debt in that manner." *State v. Quisenberry,* 639 S.W.2d 579, 582 (Mo. banc 1982). Therefore, "an honest albeit erroneous belief in the right to take the money of another in satisfaction of a debt owed negated the felonious intent necessary for the crime of robbery." *Id.*

This is not to say that the "self-help" measures such as those taken by appellant are sanctioned. "Clearly, one has no legal right to take the

property of another in satisfaction of an unrelated debt without the permission of the owner…" *Id.* at 584, fn. 15. Nevertheless "[acting in honest belief of right to property] would negate the felonious intent necessary for stealing, because it is rightly recognized as an issue upon which the defendant does not have the burden of proof." *Id*.

Quisenberry makes it clear that if appellant established his "honest belief" that he had the right to take money to satisfy Hamilton's debt, he established a defense to both robbery and second degree murder based upon that robbery. Since robbery is a forcible stealing, § 565.030, and since a stealing does not occur where there is an honest belief in a claim of right, such a defense is necessarily a defense to robbery. *See also,* MAI-CR 323.04, Note on Use 2 (expressly providing a claim of right defense to second degree robbery).

There was evidence that appellant honestly believed he had the right to take money from Hamilton. First, there was evidence that at the time of the incident Hamilton still owed appellant money. Although Hamilton testified that he paid appellant in full that same night (Tr. 179), he contradicted himself and testified that he could not recall discussing money when he met him on the road and was not sure when he paid appellant (Tr. 217). Furthermore, it was not clear that there was a meeting

of the minds as to what was owed (Tr. 167). The evidence supporting a lesser included instruction did not need to come from the defense. *State v. Pond,* 131 S.W.3d 792, 794 (Mo. banc 2004).

There was evidence that Hamilton still owed appellant money, and since it had been about a year (Tr. 216), there was evidence suggesting that appellant was of the honest belief that Hamilton did not take his debts seriously and appellant would not get what was rightfully his if he did not take matters into his own hands.

There was also evidence that appellant subjectively believed that Hamilton owed him money. He went to Sanders' home and said he was going to get money from someone who owed him (Tr. 381). He claimed that Hamilton owed him $25 and said "I'm going to get my money" (Tr. 395). Appellant's honest belief that he was owed was established by the circumstances surrounding the offense. *See, State v. Salmon*, 89 S.W.3d 540, 547 (Mo.App. W.D., 2002) (holding that the mental elements involved in an offense "may be proved by indirect evidence and inferences reasonably drawn from the circumstances surrounding" the incident).

The jury could have found from this evidence that appellant assaulted Hamilton, which was an unlawful way to collect a debt, but did not commit a crime involving dishonesty. The trial court should have

resolved the uncertainty in the evidence in favor of instructing the jury on the lesser included offense. *Yacub, supra*. Refusing to so instruct the jury deprived appellant of due process since it effectively left the jury with no decision as to the facts truly at issue.

Moreover, since felony murder is derivative of the robbery charge, proving the intent element of second degree murder, § 565.021, it too is subject to this defense. *State v. Gheen,* 41 S.W.3d 598, 605 (Mo. App., W.D. 2001). The commission of a felony is the means of proving "the requisite intent for murder." *State v. Clark,* 652 S.W.2d 123, 126 (Mo. banc 1983). This necessarily presupposes a properly instructed jury finding the commission of the underlying robbery.

"[T]he unavailability of the . . . option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason -- its belief that the defendant is guilty of some serious crime and should be punished." *Beck v. Alabama*, 447 U.S. 625, 642, 100 S.Ct. 2382, 2392, 65 L.Ed.2d 392 (1980). Consequently, failing to submit the lesser included offense instructions left the jury with an all or nothing decision, which "would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637, 100 S.Ct. at 2389. That applies with equal force in this case, in view of the tragic death that resulted.

As in *State v. Bigham,* 628 S.W.2d 681, 683 (Mo.App. E.D. 1982),

> "[b]ecause appellant presented evidence that would support a finding that he committed assault only, the assault instruction should have been given…Without the assault instruction, the jury could have believed appellant's story and yet still found him guilty of robbery because they believed appellant committed a crime. The only crime the trial court's instructions permitted them to find him guilty of was robbery."

The law does not impute dishonesty to one who is legitimately owed money and attempts to get it through improper means. Nevertheless, this is what the trial court effectively did. Had the trial court presented the jury with a real alternative, the verdict may have been different. The trial court, instead, eliminated this alternative, and thereby deprived appellant of due process. *Beck v. Alabama, supra.* Therefore this Court should reverse his convictions and remand for a new trial.

II.

The trial court abused its discretion in overruling defense counsel's objections and in admitting evidence that on September 1, 2003, and earlier, appellant threatened to rape Hamilton's wife and threatened the family in an incident in which the Hamilton family was forced to hide out and in which a window of Hamilton's truck was broken, because that evidence was neither logically nor legally relevant and its admission violated appellant's rights to due process of law and to be tried only for the crime with which he was charged, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, and 18(a) of the Missouri Constitution, in that the result was a trial within a trial forcing appellant to defend against a charge that had never been filed and creating a likelihood that he was convicted because he had committed the uncharged crimes.

The trial court erred in overruling appellant's objections and in admitting evidence of threats and property damage occurring at least two days before the shooting. Appellant was prejudiced by this evidence because it resulted in a trial within a trial, with the state forcing appellant to defend against a charge which had never been filed and for which he

was not on trial. Appellant raised this issue in his motion for new trial (L.F. 52-54).

Art. I, §17 Mo. Const. provides "[t]hat no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information. . . ." Art. I, §18(a) Mo. Const. provides "That in criminal prosecutions the accused shall have the right to . . . demand the nature and cause of the accusation. . ."

During direct examination of the Hamiltons, the state took them through an incident occurring September 1 in which appellant approached them in front of their camper (Tr. 172). Appellant was enraged and his behavior frightened them so much that the family drove to the south edge of their property and hid from him for 45 minutes (Tr. 173-76, 242-45). While they were there, they heard a loud truck drive near them; appellant's truck was loud (Tr. 176). When the family returned to the camper, a window had been broken out of Hamilton's vehicle (Tr. 177). Appellant had previously threatened to rape Angela Hamilton and "have his way with her" (Tr. 174).

The defense objected to this inflammatory questioning (Tr. 170-74, 242), and the state argued that it went to Hamilton's reasonableness in

shooting the victim (Tr. 175). The court overruled the objections and allowed the jury to hear about these incidents.

A trial court has broad discretion in deciding whether to admit evidence and its decision will not be disturbed unless a clear abuse of discretion is shown. *State v. Danikas*, 11 S.W.3d 782, 788 (Mo.App., W.D. 1999). "The decision to admit evidence is an abuse of discretion where it 'is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.'" *Id., quoting Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991).

It is well settled, however, that evidence of uncharged crimes is inadmissible to prove that a defendant has a propensity to commit similar crimes. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). This is the rule because "showing the defendant's propensity to commit a given crime is not a proper purpose for admitting evidence, because such evidence 'may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crimes charged.'" *State v. Burns*, 978 S.W.2d 759, 761 (Mo. banc 1998) [citing *Bernard*, 849 S.W.2d at 16.]

There are exceptions to this general rule, if the evidence is logically relevant "in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial" and legally relevant, in that "its probative value outweighs its prejudicial effect." *Burns*, 978 S.W.2d at 761. "Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." *State v. Clover*, 924 S.W.2d 853, 856 (Mo. banc 1996) [citation omitted].

The admission of other crimes evidence which is "not properly related to the cause on trial violates the defendant's right to be tried for the offense with which he is charged by the information." Art. I, § 17 Mo. Constitution, *Burns*, 978 S.W.2d at 760-62.

Missouri courts have found evidence of other crimes to be both logically and legally relevant where the evidence shows motive, intent, the absence of mistake or accident, a common plan or scheme or identity. *Danikas*, 11 S.W.3d at 788. The exception must relate to a legitimate issue in the case, however. *State v. Conley*, 873 S.W.2d 233, 237 (Mo. banc 1994).

In assault cases, previous assaults by a defendant upon the same victim involved in the offense for which the defendant is on trial can be

logically relevant to show motive, intent, or absence of mistake or accident. *State v. Candela,* 929 S.W.2d 852, 871 (Mo. App. E.D. 1996); *Danikas,* 11 S.W.3d at 789-90. However, such evidence is only admissible for those purposes if the defendant puts motive, intent, mistake or accident at issue in the case. *See, Conley* at 237. Otherwise, "the prejudicial effect of admitting the evidence is substantial." *State v. Wallace,* 943 S.W.2d 721, 725 (Mo. App. W.D. 1997). Similarly, evidence of prior bad acts can only be used to show identity if identity is an issue at trial. *See State v. Anthony*, 881 S.W.2d 658, 660 (Mo. App. W.D. 1994).

Here, the state argued that the September 1 incident, along with the previous threats, were relevant to show Hamilton's reasonable belief that he needed to use force (Tr. 175). That was neither an exception to the general rule nor a legitimate issue in the case. Murder resulting from the commission of a felony is murder regardless of whether the actual shooter had a legitimate reason to use deadly force. §565.021, RSMo. 2000.

Although a fair reading of the evidence may yield an inference that Hamilton's actions were not justified, the state chose to put appellant, not him, on trial and so Hamilton's justification was not at issue. Likewise, evidence that appellant threatened to rape Angela Hamilton, or evidence concerning the broken window, did not tend to establish intent, identity or

any other element of proof that was at issue. It was completely gratuitous and inflammatory, serving only to portray appellant as violent and assaultive.

The defense involved an expert's review and opinion that the incident did not in fact occur as Hamilton claimed (Tr. 435-36). There was no claim that *appellant's* actions were an accident, and appellant did not contest identity. *Conley, supra.*

Evidence of the prior incident was not strictly necessary to the state's case. *See State v. Collins*, 669 S.W.2d 933, 936 (Mo. banc 1984). Its erroneous admission did nothing more than encourage the jury to convict appellant because of his violent character, regardless of whether he was actually guilty of the crimes. *See State v. Pennington*, 24 S.W.3d 185, 189 (Mo. App., W.D. 2000). It distracted the jury from forming a critical judgment of Hamilton's unlikely testimony and derelictions by focusing on totally unrelated and inflammatory matters.

As well as being irrelevant, the evidence was also highly prejudicial. It focused the jury's attention on appellant's proclivity for violence and portrayed him as a destructive, dangerous person. As in *State v. Barriner*, 34 S.W.3d 139, 152 (Mo. banc 2000), "[t]his Court cannot say that the inadmissible evidence did not contribute to the jury's verdict."

The authorities found a man lying outside Hamilton's home. Hamilton and Angela told conflicting stories about the incident (Tr. 186-87, 251-53), and Hamilton lied to them about what happened (Tr. 188, 233). Hamilton was outside, not inside as he claimed, when he shot Sanders (Tr. 435). Hamilton was the one with prior convictions, for unlawful use of a weapon and marijuana possession (Tr. 188, 233).

The state could not have possibly had confidence in the Hamiltons' statements. All the state could know was that a man had been shot. Instead of asking for appellant's version to get a better picture, the authorities took the Hamiltons at their highly dubious word and went after appellant (Tr. 326-27, 336), untimately trying a case making Hamilton the victim and giving him a pass for the debt and shooting despite the indications that Hamilton was not telling the truth. No other witness allegedly present at the Hamiltons' home corroborated the account of appellant's earlier visit or threats. These could also have been concocted by the Hamiltons to make the situation look more dangerous, but they were introduced anyway.

The jury could not have possibly known what really happened the Hamilton's home on September 1. Yet, because appellant had allegedly threatened the Hamiltons, he was convicted because of his violent

proclivities. Appellant was tried as much for assaulting and threatening the Hamiltons as for robbing Mr. Hamilton.

None of the evidence had any probative value in proving that appellant committed robbery or second degree murder. Appellant was forced to stand trial and face possible conviction based on charges that were never filed against him. That evidence could only lead to the "spurious presumption of guilt in the minds of the jurors." *Clover*, 924 S.W.2d at 856. This Court should reverse appellant's convictions and remand for a new, and fair, trial, without the irrelevant and prejudicial evidence.

CONCLUSION

For the reasons set forth above appellant requests that this Court reverse and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Rosalynn Koch, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,017 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in November, 2005. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 18th day of November, 2005, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Rosalynn Koch

APPENDIX

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